

October 10, 2011

Mark Shonkwiler
Assistant General Counsel for Enforcement
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6396 (Crossroads Grassroots Policy Strategies)

Dear Mr. Shonkwiler,

The following response is submitted by the undersigned counsel on behalf of Crossroads Grassroots Policy Strategies (Crossroads GPS), in response to your correspondence of September 28, 2011, offering us the opportunity to supplement our prior responses in light of the Office of General Counsel's consideration of various news articles.

As we have explained and demonstrated in our prior responses, Crossroads GPS is not a "political committee" under the Federal Election Campaign Act, as amended, and as interpreted by the courts and the FEC over the years. We have presented irrefutable evidence that the major purpose of Crossroads GPS is not federal campaign activity, as those terms are currently understood and measured. For the FEC to find otherwise would require a change in the applicable law.

Generally speaking, the media is neither aware of nor particularly concerned with the subtleties of campaign finance regulation. All too often, their sources for story ideas and angles appear to come from the so-called "reform" lobby. The views of these small, unrepresentative interest groups tend to go unchallenged and dominate media coverage of campaign finance matters.

As we noted in our Initial Response, "the only way to determine the 'major purpose' of an organization is by reviewing the organization's activities in terms of 'express advocacy' and 'issue advocacy.' Other factors, such as officer and director statements and other public

statements are peripheral to the inquiry.” Response of Crossroads Grassroots Policy Strategies in MUR 6396 at 3 (Dec. 22, 2010). The media’s characterizations of the activities of Crossroads GPS are completely irrelevant to this inquiry, should generally be treated as unreliable, and should carry no legal weight whatsoever.

As we noted in our first response, the Complainants did not present evidence that justified their ultimate legal conclusion. We fully responded to the materials included in the Complaint and sought dismissal of the Complaint. Complainants did not meet their burden of presenting facts that demonstrated that there is reason to believe a violation occurred. Nevertheless, the Office of General Counsel (OGC) conducted a broad investigation into our client’s activities prior to the Commission making a formal reason to believe determination. Section 437g(a)(2) indicates that the Commission shall make a reason to believe finding, notify the respondent of that finding, and then “shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.” See also 11 C.F.R. § 111.10(a) (“An investigation shall be conducted in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred or is about to occur.”). In this matter, however, it is apparent that OGC has already conducted a significant investigation. Your correspondence of September 29 references 18 sources, all but a few of which were not contained in either the complaint or our prior responses. The index you provided also indicates that these articles have already been included in the First General Counsel’s Report, which suggests that OGC has already prepared a reason to believe recommendation for the Commissioners, based in part on materials uncovered in an investigation that is not supposed to occur until after the Commission has made a reason to believe finding.

Nevertheless, we appreciate the opportunity to review these materials and respond to them in writing before the Commission votes on OGC’s recommendation.

Materials Discovered by the Office of General Counsel During Its Premature Investigation

1. *Crossroads hauls in \$8.5M in June, Politico, June 30, 2010.*

This article, unlike many others, actually recognizes that Crossroads GPS and American Crossroads have very different missions. As Steven Law states in the article, Crossroads GPS was created for “doing very legislatively focused issue advocacy activity” and “building out a very substantial grassroots activist network that we plan to organize both around issues and geographically, that we can deploy along with our advertising strategy.” And as the author writes, “GPS will focus its issue campaigns on the implementation of the Democratic healthcare overhaul and stimulus package, as well as the national deficit and debt.”

Mr. Law's statement regarding donor disclosure is irrelevant to the legal analysis of "political committee" status. The article demonstrates quite clearly that Crossroads GPS was created to undertake activities that are quite properly undertaken by Section 501(c)(4) entities, and for which no donor disclosure is legally required.

2. Internal Revenue Service, *Exempt Organizations – Contributors' Identities Not Subject to Disclosure.*

This webpage restates a portion of current tax law that applies to various Section 501(c) and 527 organizations. It has no bearing whatsoever on the issue of whether Crossroads GPS is a "political committee" under the Federal Election Campaign Act.

3. Crossroads GPS, *Crossroads GPS and American Crossroads pledge \$120 million for 2012 effort.*

4. American Crossroads, *American Crossroads and Crossroads GPS pledge \$120 million for 2012 election.*

These blurbs were most likely posted to the websites of American Crossroads and Crossroads GPS on March 1, 2011. (Both link to Article #17 on OGC's Index.) They simply refer to the linked story, and should not be read as either organization's own characterization of activities. As discussed below, the article contains serious mischaracterizations that are not supported by any quoted material from representatives of either American Crossroads or Crossroads GPS.

5. *Lax Internal Revenue Service rules help groups shield campaign donor identities,* Washington Post, March 9, 2011.

If it is not plainly obvious, this story was spoon-fed to the writers by Citizens for Responsibility and Ethics in Washington (CREW), and is nothing more than an example of the outsized role that left-wing interest groups have in establishing the "narrative" of campaign financing reporting.

As the article notes, Crossroads GPS filed a Form 1024 application with the Internal Revenue Service (IRS) in September 2010, but the IRS has not yet responded to that application. As of the date of this response, the only communication that Crossroads GPS has received from the IRS in connection with its Form 1024 application is a notification of receipt. Crossroads GPS has no control over the internal procedures of the IRS, and as spokesman Jonathan Collegio stated for this article, "reading anything into it beyond a typical procedural issue is irresponsible."

A Form 1024 application is a voluntary filing – a Section 501(c)(4) organization is not legally required to obtain IRS recognition of its tax status. CREW has sought to use this issue to smear Crossroads GPS as somehow less than legitimate, and succeeded in planting its story with *Washington Post* reporters. There is, however, no legal significance to anything in this article.

6. *GOP Sees Flaws in Tea Party Candidates*, Roll Call, Nov. 3, 2010.

15. *Outside Groups on the Right Flexed Muscles*, New York Times, November 3, 2010.

These articles selectively quote statements made by Carl Forti to reporters during a post-election day review. The discussion with reporters was focused on the previous night's election results, and Mr. Forti spoke directly about American Crossroads' efforts, as well as the independent expenditure activity undertaken by Crossroads GPS. None of the material attributed to Mr. Forti in either article has any bearing on the legal questions at issue in this matter. Moreover, the media's tendency to lump American Crossroads and Crossroads GPS together and emphasize only their political activity also is of no relevance to the legal question of whether Crossroads GPS satisfies the legal definition of a "political committee."

7. *Is Michael Steele Ready To Move On?*, National Public Radio, Dec. 13, 2010.

The author misreports the role of Mike Duncan in this piece. Mr. Duncan is the Chairman of the Board of Directors of American Crossroads. He is neither an officer nor a director of Crossroads GPS. American Crossroads and Crossroads GPS have no overlap in their respective Boards.

The author's characterization of American Crossroads and Crossroads GPS as "two outside money groups that acted as a sort of surrogate RNC" is strictly his opinion, and is in no way the opinion of a qualified legal expert. This comment is simply "analysis" masquerading as straight news.

8. *RNC weighs outsourcing list*, Politico, May 17, 2011.

This article reveals a proposal that was reportedly discussed several months ago. Crossroads GPS has not taken over the RNC's voter list operation. The article correctly notes that Crossroads GPS has taken steps to build its own list: "the group indicated it would spend \$5 million on 'list acquisition and enhancement' and planned to 'build the highest-quality national list of center-right advocates and sympathetic (voters) possible.'" The insertion of "(voters)" was done by the authors of the articles. "Supporters" would have been a more accurate editing choice, especially considering that the purpose of the list is explained in the second half of the same sentence: "then engage that community intensively with policy information and advocacy requests."

As the article states, Crossroads GPS entered into a list exchange agreement with the Republican National Committee. The longstanding position of the FEC is that such list exchange agreements are entirely permissible. *See, e.g.,* Advisory Opinion 2002-14 (Libertarian National Committee) ("Likewise, the LNC may exchange its mailing lists or portions of its mailing lists of equal value with any outside organization, including political committees under the Act, Section 527 organizations (including state and local campaign, PAC, and party organizations), 501(c)(3) and (c)(4) groups, non-profit and for-profit corporations, and labor organizations, provided that the lists or the portions of the lists that are exchanged are of equal value."). The Commission has never previously suggested that the identity of an organization's list exchange partner had any relevance in a "political committee" inquiry.

9. ***Rove-linked group uses secret donors to fund attacks, Politico, July 20, 2010.***

This article was referenced in the Complaint, at Paragraph 33. We responded to the specific allegations made in the Complaint in our Initial Response:

At Paragraph 33 of the Complaint, Complainants cite a *Politico* story reporting "Crossroads GPS micro-targeting effort" was "focused on seven states - Colorado, Florida, Missouri, New Hampshire, Nevada, Ohio and Washington." Crossroads GPS engaged in micro-targeting efforts in these and other states. While Complainants appear to presume that "micro-targeting" is some sort of campaign tactic, it is simply research to identify distinguishing characteristics of people concerned about particular issues. "Micro-targeting" is performed by all manner of advocacy and commercial marketing organizations, and its purpose is to aid in more efficient and effective communications. Crossroads GPS's "micro-targeting" efforts tested its "7 in '11" National Action Plan.

Response of Crossroads Grassroots Policy Strategies in MUR 6396 at 17 (Dec. 22, 2010).

While the above portion of the article might be confusing to people who presume that "microtargeting" is a strictly political tactic, the article also contains willful misreporting. The author's claim that "American Crossroads GPS [sic] has been telling donors their contributions would be used to dig up direct on Congressional Democrats' 'expenses account abuses'" is an intentional mischaracterization of a draft, so-called "concept paper." (This article does not claim any potential donors as sources, so any assertions of what donors were told by Crossroads GPS, apart from what is contained in the draft "concept paper," is pure speculation on the author's part.) In fact, the "concept paper" indicates that Crossroads GPS intended to conduct "in-depth research on congressional expense account abuses" and pursuing "fiduciary-quality standards for Congress" as part of a "Reforming Congress" initiative. Such efforts are traditional "watchdog" activities and a far cry from conducting partisan opposition research. We also note

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that the article was corrected (“clarified,” in Politico’s terms) to include the following statement from Mr. Collegio: “Crossroads GPS does not invest in opposition research.”

In addition, the “concept paper” absolutely *does not* say that Crossroads GPS will “blame Democrats for ‘failed border controls,’ as the author asserts. The paper simply referred to “failed border controls” as a “timely issue.”

As Steven Law states in this article, “The genesis of [Crossroads GPS] from our perspective was that there are a number of things that are priorities for us that seemed to fit more into a 501(c)(4) than a 527, such as doing very legislatively focused issue advocacy activity which we will be undertaking in the next few months.” (Note: this quote first appeared in a June 30, 2010, article by the same author, and is included as Article #1 in OGC’s index.)

10. *The New GOP Money Stampede*, Time, Sept. 16, 2010.

In this piece, the author simply conflates Fred Wertheimer’s hyperbolic spin with fact. He quotes Wertheimer saying that Crossroads GPS “is a complete joke. Karl Rove and Gillespie did not create this organization to influence issues in America. The organization was created to elect Republicans and defeat Democrats.” Just above this quote, the author “reports” that “[o]stensibly, that means that a group like Crossroads GPS conducts what it calls ‘hard-hitting issue advocacy.’ In practice, that means thinly veiled ads on behalf of Republican candidates, like an ad bashing Democratic Kentucky Senate nominee Jack Conway’s support for Obama’s health care reform, which ends with the memorable kicker, ‘It’s the wrong way, Conway.’”

Mr. Wertheimer may be widely quoted by reporters and editorial boards covering the “money and politics” beat, but that does not mean that his views have any evidentiary or legal value. As a professional lobbyist and activist for policy change in the election law arena, Mr. Wertheimer frequently uses rhetoric, and even legal filings, to advocate for a version of the law as he would like it to be. He does not provide authoritative statements on what the law actually is. The Commission should not give any credence to his propaganda, whether it comes in the form of a direct quote, or is paraphrased and presented as actual “news” by a sympathetic reporter.

Mr. Wertheimer authored an op-ed that appeared in *Politico* the day after this article was published.¹ The thematic and factual similarities between the two pieces are very curious. The *New York Times* followed suit one day later with an editorial that – incredibly – repeated the same charges almost verbatim:

¹ See Fred Wertheimer, *Secret Funds Flow Into Races*, Politico (Sept. 17, 2010) available at <http://www.politico.com/news/stories/0910/42293.html>.

Most of the cash has gone to Republican operatives like Karl Rove who have set up tax-exempt 501(c)(4) organizations. In theory, these groups, with disingenuously innocuous names like American Crossroads and the American Action Network, are meant to promote social welfare. The value to the political operatives is that they are a funnel for anonymous campaign donations.

Mr. Rove's group, American Crossroads, hopes to spend \$50 million, and is already advertising against Democratic candidates in California, Pennsylvania, Nevada and other states. The American Action Network, led by Norm Coleman, the former Republican senator from Minnesota, is spending \$25 million, and has been blasting the Democratic senators Patty Murray in Washington and Russell Feingold in Wisconsin.

The United States Chamber of Commerce, still boiling over its failure to stop health care reform, is spending \$75 million to defeat the lawmakers who approved it. Their donors need not be revealed. (Labor unions are trying to do the same thing for Democrats, but cannot raise nearly as much money.)

New York Times, *The Secret Election*, Sept. 18, 2010 available at <http://www.nytimes.com/2010/09/19/opinion/19sun1.html> (emphasis added).

We hope the Commission recognizes that the *Time* magazine article that apparently was given some weight by OGC was part of a coordinated lobbying campaign carried out by self-styled "reform" activists in the media in early fall 2010 and subsequently echoed by Democratic National Committee Chairman Tim Kaine² and Democratic Congressional Campaign Committee Chairman Chris Van Hollen.³ It is also worth considering whether other media reports concerning Crossroads GPS are similarly compromised.

The advertisement aired in Kentucky that is referenced in the article was addressed in our Initial Response. We explained that it was "seven issue advocacy and/or grassroots lobbying advertisements on issues related to the '7 in '11' National Action Plan" aired by Crossroads GPS in Summer 2010. Response of Crossroads GPS, December 22, 2010 at 8. In addition:

Each of these advertisements constituted grassroots lobbying and issue advocacy under

² See Democratic National Committee Press Release, "DNC Chairman Tim Kaine Calls on Karl Rove to Disclose Donors to his Shadowy, Outside Groups" available at http://www.democrats.org/news/blog/dnc_chairman_tim_kaine_calls_on_karl_rove_to_disclose_donors_to_his_shadowy.

³ See Rove: Dems' Attacks on GOP Donors "Hypocritical", CBS Face the Nation available at <http://www.cbsnews.com/stories/2010/10/24/ftn/main6987206.shtml>.

Chief Justice Robert's *Wisconsin Right to Life* test, and none contained express advocacy. These ads urged viewers to take action with respect to specific policies or legislation under consideration by Congress. The ads prominently provided the address of the Crossroads GPS website, which directed visitors to template pages enabling viewers to send letters and emails to Members of Congress, urging them to take specific policy and legislative actions. Viewers could also send letters to the editors of various publications and make blog postings.

Response of Crossroads Grassroots Policy Strategies in MUR 6396 at 8 (Dec. 22, 2010).

11. *GOP groups coordinated spending*, Politico, November 3, 2010.

This article refers to American Action Network as "a Crossroads affiliate." This is incorrect. American Action Networks is an entirely separate organization with its own leadership, staff and direction.

The article also asserts that Crossroads GPS "sank \$17 million into ads and turnout communications." This figure presumably includes non-express advocacy advertisements that Crossroads GPS reported to the FEC as electioneering communications. The correct figure for total independent expenditures is included in our Initial Response.

12. *Big Spending by Republican-Friendly Groups*, New York Times, October 13, 2010.

13. *Conservative group, flush with funds, turns to House*, Washington Post, October 14, 2010.

14. *GOP Groups Launch Massive Ad Blitz*, Wall Street Journal, October 13, 2010.

Articles #12-14 report that Crossroads GPS participated in what was dubbed the "House surge strategy." Crossroads GPS acknowledges, and has never denied, that it produced and distributed express advocacy communications. See Initial Response of Crossroads GPS (Dec. 22, 2010) at 1, 2, 4, 7, 10, 11, 13, and 21. As is amply demonstrated in our Initial Response and Supplemental Response of September 9, 2011, the major purpose of Crossroads GPS, however, is not Federal campaign activity.

16. *Conservative group fires first shot in U.S. Senate race ad war*, Kentucky.com, August 26, 2010.

This article discusses the same advertisement discussed in Article #10 above. Jonathan Collegio is quoted in the article, but it is unclear what exactly he was responding to. He may have been discussing planned activities of American Crossroads, or simply offering a reason why other groups might run ads in Kentucky. Later in the article, the author includes information

provided by Mr. Collegio that emphasizes the legal and organizational differences between Crossroads GPS and American Crossroads, and correctly notes that Crossroads GPS "can say – as it does in the new TV ad – that Conway's position is wrong and that voters should urge him to change it."

17. *2012 Election Spending Race Heats Up*, Wall Street Journal, March 1, 2011.

The lead paragraph of this article is incorrect. American Crossroads and Crossroads GPS did not "set a goal of raising \$120 million in the effort to defeat President Barack Obama, win a GOP majority in the Senate and protect the party's grip on the House in the 2012 election." That is the author's characterization of the purposes for which the organizations intend to spend funds raised. At the time the article was published, representatives for American Crossroads and Crossroads GPS did, however, indicate publicly that the two groups aimed to raise a total of \$120 million by the end of 2012.

The suggestion that the efforts of American Crossroads and Crossroads GPS "could complement the Republican National Committee's focus on rallying Republican voters and funding state parties" is the author's conjecture.

Finally, the sentence, "American Crossroads and Crossroads GPS disclosed in an annual report sent to donors this week that they spent 96% of the money raised on campaigns," is incorrect. The organization's supporters were informed that over 96% of the organizations' funds had been spent on activities *other than* fundraising expenses and administrative/overhead costs. This certainly does not mean that all other spending was "on campaigns." The correct figures for Crossroads GPS's activity that was for the purpose of influencing elections were provided in our Initial Response.

18. *Political groups, now free of limits, spending heavily ahead of 2012*, Washington Post, May 21, 2011.

This article is almost entirely about American Crossroads. Jonathan Collegio is quoted saying, "The Crossroads groups have stated that we'll be involved heavily in 2012, both in congressional races and the presidential side as well." Crossroads GPS anticipates making independent expenditures in connection with the 2012 elections. As was the case in 2010, however, Federal campaign activity will not be the organization's major purpose.

We once again urge the Commission to dismiss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Josefiak', with a stylized flourish at the end.

Thomas J. Josefiak

Michael Bayes

Counsel to Crossroads GPS

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